

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY E. BERND

Claimant

VS.

VALLIS FORM SERVICE

Respondent

AND

**TWIN CITY FIRE INSURANCE COMPANY and
SAFECO INSURANCE COMPANY**

Insurance Carriers

Docket No. 1,023,243

ORDER

Respondent and its insurance carrier Twin City Fire Insurance Company appealed the September 21, 2006, Award entered by Special Administrative Law Judge E. L. Lee Kinch. The Workers Compensation Board heard oral argument on December 20, 2006.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Patricia A. Wohlford of Overland Park, Kansas, appeared for respondent and Twin City Fire Insurance Company (Twin City). Jason J. Montgomery of Roeland Park, Kansas, appeared for respondent and Safeco Insurance Company (Safeco).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for binaural (bilateral) hearing loss due to the work claimant performed for respondent from 1990 through April 19, 2005. In the September 21, 2006, Award, Judge Kinch determined (1) the date of accident for this repetitive-trauma injury was April 19, 2005, which was claimant's last day working for respondent; (2) claimant

sustained a 77.8 percent binaural hearing loss; and (3) Twin City Fire Insurance Company, which was the insurance carrier on April 19, 2005, was responsible for the benefits awarded. Accordingly, Judge Kinch awarded claimant permanent disability benefits against respondent and Twin City for a 77.8 percent binaural hearing loss under K.S.A. 44-510d.

Respondent and Twin City contend the Judge erred. They request the Board to find two dates of accident and only hold Twin City responsible for an 11.9 percent binaural hearing loss, which they allege represents the increased hearing loss claimant sustained after August 2002, which they allege should be deemed the first date of accident. In the alternative, should the Board affirm the Judge's date of accident (April 19, 2005), they argue they should receive a credit or reduction for preexisting impairment under K.S.A. 44-501(c), which would reduce their liability to that of an 11.9 percent binaural hearing loss. Accordingly, respondent and Twin City request the Board to modify the September 21, 2006, Award.

Conversely, both claimant and Safeco contend the Award should be affirmed. Both parties argue Kansas law places liability for repetitive-trauma injuries on the insurance carrier that is on the risk at the time of the last injurious exposure.

The issues before the Board on this appeal are:

1. What is the date of accident for the hearing loss claimant allegedly sustained working for respondent from 1990 through April 19, 2005?
2. What is the nature and extent of claimant's injury and disability?
3. Should any award be reduced pursuant to either K.S.A. 44-510a or K.S.A. 44-501(c)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed.

The Special Administrative Law Judge set forth detailed facts and conclusions in the Award. The Board adopts those findings of fact and conclusions of law as its own.

In summary, claimant sustained a series of repetitive traumas to his ears during the more than 20 years that he operated a press for respondent. Claimant's last day of working for respondent was April 19, 2005, when respondent closed its plant.

Only one physician, Dr. Mark S. Dobyns, testified to the extent of claimant's hearing loss. Dr. Dobyns, who saw claimant in July and August 2005, concluded claimant had sustained sensorineural hearing loss consistent with prolonged exposure to loud noise. The doctor determined claimant had a 77.8 percent binaural hearing loss.

Because Twin City was the insurance carrier on the date of claimant's last injurious exposure, the Judge concluded Twin City was responsible for the Award. The Judge reasoned:

Turning to the issue of which insurance carrier is responsible for benefits due, the evidence shows that Safeco Insurance Company of Illinois provided coverage from October 1, 1999 to October 1, 2002. The evidence further shows that Twin City Fire Insurance Company, Inc. provided coverage from December 1, 2004 through the date upon which the Respondent's plant closed on April 19, 2005.

Safeco Insurance Company of Illinois argues that liability for Claimant's disability should be imposed on Twin City Fire Insurance Company, Inc. under authority of the last injurious exposure rule. The Court concurs. The Court, in *Helms v. Tollie Freightways, Inc.*, 20 Kan.App.2d 548, 889 P.2d 1151 (1995), held that "[T]he last injurious exposure" rule in successive-injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability." Claimant's date of injury for the purpose of this award is April 19, 2005. Accordingly, Respondent and Twin City Fire Insurance Company, Inc. are liable for all benefits awarded.¹

The Judge declined to apportion the liability for claimant's repetitive-trauma injury.

Twin City argues that the liability for claimant's hearing loss should either be apportioned between the insurance carriers or that it should receive a credit or offset under either K.S.A. 44-510a or K.S.A. 44-501(c) for preexisting functional impairment. The Board disagrees. First, K.S.A. 44-510a requires overlapping weeks of permanent disability benefits, which are not present in this proceeding. Second, claimant's injury occurred over the period from 1990 through April 19, 2005, and there is no proof as to the extent of claimant's hearing loss before that period of injury began.

Moreover, there is no statutory authority to apportion the liability among insurance carriers for the repetitive injuries sustained during one period of accident. The Kansas Supreme Court has long held that, unless specifically provided, the Division of Workers

¹ ALJ Award (Sept. 21, 2006) at 6.

Compensation does not have the authority or jurisdiction to determine the respective liability of two or more insurance carriers.² In *Hobelman*, the Kansas Supreme Court said:

The Workmen's Compensation Act has as its primary purpose an expeditious award of compensation in favor of an injured employee against all persons who may be liable therefor. The Act does not contemplate that such proceedings should be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the Act for the payment of compensation. Questions of contractual obligations or even equitable considerations may well be involved between the responsible parties which are of no concern to the injured employee. If such questions are involved, they should be resolved by a court in an independent proceeding in which the employee should not be required to participate.³

That rule was repeated 29 years later by the Kansas Court of Appeals in *American States*⁴ in which the Court stated:

Unless specifically allowed by statute, insurance companies may not litigate in the workers compensation division their respective liability for an award if the employee's interests are not at issue.⁵

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the September 21, 2006, Award entered by Judge Kinch.

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the

² *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).

³ *Id.* at 831.

⁴ *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App. 2d 492, 794 P.2d 662 (1990).

⁵ *Id.* at 498.

⁶ K.S.A. 2005 Supp. 44-555c(k).

attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

IT IS SO ORDERED.

Dated this ____ day of February, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and Twin City
Jason J. Montgomery, Attorney for Respondent and Safeco
Thomas Klein, Administrative Law Judge
E. L. Lee Kinch, Special Administrative Law Judge